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No. 09-1097

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ANTONIO PECK, a minor by and through his parents and next friends, JO ANNE PECK and KENLEY LESTER PECK,

Petitioner,

v.

BALDWINSVILLE CENTRAL SCHOOL DISTRICT, CATHERINE MCNAMARA ELEMENTARY SCHOOL, MARY R. SCHILZ, in her official capacity as Principal of Catherine McNamara Elementary School, JEANNE DANGLE, in her official capacity as Superintendent for Baldwinsville Central School District,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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INTRODUCTION

Petitioner Antonio Peck ("Petitioner") has presented no "compelling reasons" for his Petition for a Writ of *Certiorari* ("Petition") to be granted. *See* Sup. Ct. R. 10.

This action was commenced in 1999, when Petitioner was a six-year-old kindergarten student in the Baldwinsville Central School District in Upstate New York. The complaint alleged that school officials had violated Petitioner's rights under the First and Fourteenth Amendments when they failed to allow him to display a picture of Jesus at a kindergarten assembly about the environment.

At trial, Petitioner failed to adduce any evidence that this event was the result of a school district policy or custom, or that there was any reasonable likelihood that he would again suffer such an alleged deprivation of rights. Thus, the Second Circuit correctly found that Petitioner lacked standing to seek declaratory and injunctive relief. (Pet. App. at 6a). And, although Petitioner had sought "nominal damages" before the district court, on appeal to the Second Circuit he presented his case as solely "a suit for Declaratory Judgment and Permanent Injunctive relief." (Initial Brief of Plaintiff-Appellant, p. viii). Therefore, the Second Circuit properly held that Petitioner had waived any claim for damages. (Pet. App. at 5a).

STATEMENT OF THE CASE

Petitioner was a kindergarten student at Catherine McNamara Elementary School in the Baldwinsville Central School District in 1999. (Pet. App. at 12a). That year, Petitioner's kindergarten teacher, Susan Weichert, taught an environmental unit geared to the abilities of her young students. (Pet. App. at 12a). The environmental unit consisted of lessons on simple ways to preserve the physical environment and keep it clean, such as turning off lights to save energy, turning off the faucet to save water, picking up trash and recycling. (Pet. App. at 12a).

At the end of the year, Mrs. Weichert gave her class a homework assignment to draw a poster reflecting what they learned in class about preserving the environment. (Pet. App. at 13a). The purpose of the poster assignment was to assess what the children had learned about environmental conservation during the year. (Pet. App. at 13a). Mrs. Weichert instructed the children that the poster should show what they learned in class, *i.e.*, simple ways to conserve resources such as shutting off faucets and turning off lights. (Pet. App. at 13a).

The posters were to be displayed at an environmental program to be held in the school's cafeteria. (Pet. App. at 12a). Parents were invited to attend the program. (Pet. App. at 13a).

The first poster Petitioner created for the assembly was labeled "The Only Way to Save Our World!," and featured religious themes. (Pet. App. at 15a-16a). The poster was a composite of cut-out pictures that included:

a bearded man kneeling with clasped hands and eyes closed in prayer; a picture of a soldier with the words "The Armor of God"; a picture of a woman carrying fruit with the words "The Fruit of the Spirit"; a picture of a bearded man carrying two stone tablets with the words "The Ten Commandments"; a picture entitled "My God's World," with pictures of a girl, house, Bible, Jesus, family, church, God and heaven; a picture of Jesus walking with a little boy with the words "Jesus Loves the Children"; a picture of a choir singing with the words "Jesus loves me this I know, for the Bible tells me so . . ."; a picture of the sun on the horizon with the words "In the beginning God created the heavens and the earth"; a picture of a scroll with the Ten Commandments; a picture of a boy and a girl; a picture of a rainbow with the words "God keeps his promises"; and pieces of paper with the words "Prayer Changes Things" and "God's love is higher than the heavens." The poster also had a large picture of Jesus, kneeling with arms raised next to the words "Seek to Find Jesus." (Pet. App. at 15a-16a).

Mrs. Weichert saw that the poster reflected *nothing* she had taught in class. (Pet. App. at 16a). She took the poster to the school principal, Robert Creme, "to ask his advice on what I should do with this poster." (Pet. App. at 16a).

Looking at the poster, Mr. Creme became concerned because he "didn't think that it was something that Antonio had been truly responsible for." (Pet. App. at 16a; *see also* Pet. App. at 26a-27a). Mr. Creme knew about Petitioner's capabilities and progress during the school year, and what was taught in the kindergarten

environmental unit, and he "didn't see any way for Antonio to make the leap from that unit of instruction to this topic." (Pet. App. at 17a).

Mr. Creme called the district superintendent, Dr. Theodore Gilkey, to ask "if this should be handled in the same way as [other] things that were submitted that were obviously not the work of the student that supposedly submitted them." (Pet. App. at 17a). Dr. Gilkey said yes. (Pet. App. at 17a). Accordingly, Mrs. Weichert asked the Petitioner's mother to have him do a second poster. (Pet. App. at 17a).

The second poster Petitioner brought to school depicted a church with three crosses on it. (Pet. App. at 18a). There was a tree on each side of the church and four mice around the church and the trees. (Pet. App. at 18a). There were two children in front of the church throwing garbage into two trash cans. (Pet. App. at 18a). There were pictures of clouds in the sky. (Pet. App. at 19a). In the upper right of the poster, there was a picture of a globe with children holding hands around it. (Pet. App. at 19a). In the lower right, there was a picture of two people recycling. (Pet. App. at 19a). On the left, there was the same large picture of Jesus kneeling with hands lifted upwards as was on the first poster. (Pet. App. at 19a).

When Mrs. Weichert asked Petitioner to explain this second poster, he "talked about the little children throwing trash in the bucket." (Pet. App. at 19a). Petitioner did not have anything to say about the image of Jesus on his poster. (Pet. App. at 19a, 35a).

Mrs. Weichert discussed Petitioner's second poster with Mr. Creme. (Pet. App. at 19a). The two agreed that some parts of the poster were responsive to the assignment, but that the image of Jesus kneeling in prayer was not responsive, and was not Petitioner's own work. (Pet. App. at 20a). The two agreed the poster should be displayed at the assembly, with the nonresponsive portion (*i.e.*, the left third of the poster depicting Jesus kneeling in prayer) folded under. (Pet. App. at 20a). The portion of the poster that was displayed at the assembly included the picture of a church with crosses clearly visible on its steeple and in its windows. (SJA[1] at 333).

The Baldwinsville Board of Education does not have a policy regarding the display of student posters. (Pet. App. at 21a). There is no Baldwinsville Board of Education policy barring religious expression in student work. (Pet. App. at 21a).

In fact, Mr. Creme described a time he directed that a student's essay about Jesus be displayed in the main school hallway. (SJA at 460). Mr. Creme explained that second-grade students were required to select someone they admired in history (or someone they knew) and to write a paragraph explaining why they admired that person. (SJA at 460). The students were free to write about any person they felt was influential and someone to look up to. (SJA at 460). The assignment required the students to include a topic sentence, three to five factual sentences, and a concluding sentence, and the

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[1] All references to "SJA" are to the Supplemental Joint Appendix filed with the Second Circuit.

paragraph had to be properly punctuated and spelled. (SJA at 461). One student selected Jesus as the person he admired most. (SJA at 461). That student's paragraph was displayed in the hallway in front of his classroom, and eventually in the school's main hallway when the student was selected as Author of the Day. (SJA at 461).

REASONS FOR DENYING THE PETITION

The Second Circuit's decision does not conflict with a decision of this Court or any court of appeals. Petitioner has not carried his burden of demonstrating any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

I. Petitioner Produced No Evidence of the "District Wide Policy" Alleged in His Petition; The Second Circuit Correctly Held that Petitioner Lacked Standing to Seek Injunctive or Declaratory Relief in the Absence of a Likelihood of Future Harm

Much of the Petition is devoted to Petitioner's argument that the Second Circuit ruled improperly in the face of an unconstitutional "district wide policy." (*See* Petition at 11-24). The fatal flaw of Petitioner's argument is that *there was no district wide policy*.

The Petition generically refers no less than five times to a "district wide poli[illegible]," but never states what that "district wide policy" is. Petitioner cannot articulate what the "district wide policy" is, because it does not exist. Petitioner never proffered *any* evidence of a "district wide policy."

The act about which Petitioner complains was a single incident that occurred during a kindergarten assembly in 1999. The only two district employees involved – Petitioner's former kindergarten teacher and elementary school principal – have both since retired. (SJA at 342, 408). There was no evidence that their actions on that one day in 1999 were taken pursuant to any official policy of the Board of Education of the Baldwinsville Central School District. The record contains *no* evidence of any Board of Education policy barring religious expression in student work.

Although Petitioner named former district superintendent Theodore Gilkey as a defendant when he filed the action, the undisputed evidence established that Dr. Gilkey did not attend the 1999 kindergarten assembly, had no role in deciding whether or how to display Petitioner's poster at that assembly, and did not learn of the decision to fold under part of the poster until after the fact. (Pet. App. at 21a). Moreover, a school superintendent is not generally considered to be a "policymaking authority." *Gernetzke v. Kenosha Sch. Dist. No. 1*, 274 F.3d 464, 469 (7th Cir. 2001) (finding that a school superintendent was *not* a final policymaking authority for purposes of *Monell*). Indeed, New York law expressly designates the Board of Education, not a district superintendent, as the final policymaker with respect to establishing "rules and regulations concerning the order and discipline of the schools, in the several departments thereof, as they may deem necessary to secure the best educational results." N.Y. Educ. Law § 1709(2).

Nor was there any evidence that the conduct reflected a school district custom so permanent, widespread and well-settled as to constitute the equivalent of an official policy of the Board of Education. *See, e.g., Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978). There was no evidence that there was a custom of barring religious expression in student work in the Baldwinsville Central School District. In fact, where an assignment asked students to write a paragraph about a figure that inspired them and a student wrote about Jesus, the student's paragraph was accepted and displayed in the school's main hallway. (SJA at 460-61).

On this record, the Second Circuit properly found that Petitioner "offered [no] reason to believe that he faces a 'reasonable likelihood of future harm.'" (Pet. App. at 6a). Citing this Court's decision in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), the Second Circuit correctly concluded that Petitioner lacked standing to pursue his case for injunctive and declaratory relief in the absence of any such likelihood of future harm. (Pet. App. at 6a).

Petitioner faults the Second Circuit for looking to this Court's decision in *Lyons*, which Petitioner characterizes as an inapposite "criminal procedure" case. (Petition at 13). Petitioner argues that the Second Circuit instead should have followed this Court's decision in *Honig v. Doe*, 484 U.S. 305 (1988), which Petitioner calls a "students' rights case." (Petition at 13). According to Petitioner, "the standing principles in criminal procedure cases are not analogous to principles applied in students' rights cases." (Petition at 13). Thus, Petitioner argues, "this Court should grant certiorari

to . . . clarify that *Honig* . . . is to be utilized to determine whether civil rights plaintiffs still have standing." (Petition at 24).

Petitioner misses the mark. The Court in *Honig* utilized the same standing test that the Court employed in *Lyons*, and that the Second Circuit employed in this case, reaffirming that standing to seek prospective relief exists only "if there is a reasonable likelihood that [plaintiff] will again suffer the deprivation of . . . rights that gave rise to th[e] suit." *Honig*, 484 U.S. at 318. Indeed, this Court cited *Lyons* when it ruled in *Honig* that jurisdiction existed only for the one plaintiff who had demonstrated "'a sufficient likelihood that he will again be wronged in a similar way.'" *Honig*, 484 U.S. at 323 (quoting *Lyons*, 461 U.S. at 111).

Moreover, the circumstances that gave a plaintiff standing to seek injunctive relief in *Honig* have no parallel in this case. The actions challenged in *Honig* were taken pursuant to an official state policy, namely, a California statute that empowered school officials to indefinitely suspend disabled students deemed to be dangerous or disruptive. *Id.* at 313, n.2. Moreover, the California Superintendent of Public Instruction maintained a staunch "insistence that all local school districts retain residual authority to exclude disabled children for dangerous conduct." *Id.* at 319. It was on that record that this Court found that a disabled individual, who had not yet completed high school, and who, because of his disability, experienced considerable difficulty controlling his impulses and anger, had a "reasonable expectation" that he would once again be subjected to suspension for conduct growing out of his

disabilities absent injunctive relief. *Id.* "Given these representations by the [State Superintendent of Public Instruction]," this Court had "every reason to believe that were it not for the injunction barring petitioner from authorizing such unilateral action, respondent would be faced with a real and substantial threat of such action in any California school district in which he enrolled." *Id.* at 322. Nothing like that can be said in this case.

Petitioner's arguments about this Court's decisions in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), *Bethel School District v. Fraser*, 478 U.S. 675 (1986), *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), and *Morse v. Frederick*, 551 U.S. 393 (2007) also fall short. In none of those cases did this Court hold that a student has standing to seek declaratory or injunctive relief following a single incident of restricted speech, in the absence of any evidence of a school policy or custom on which the Court could find there was a reasonable likelihood that the plaintiff would again suffer the same alleged deprivation of rights that gave rise to the suit. In fact, in each of these "school speech" cases, the plaintiff's speech was restricted pursuant to an express school policy, an established school custom, or both. *See Tinker*, 393 U.S. at 504 (the principals of the Des Moines schools "met and adopted a policy that any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband"); *Bethel*, 478 U.S. at 678 (plaintiff punished pursuant to a "Bethel High School disciplinary rule prohibiting the use of obscene language in school"); *Kuhlmeier*, 484 U.S. at 568-69 (finding that a written

school board policy governing the student newspaper could reasonably be read to mean that school officials retained ultimate control over what constituted "responsible journalism," and further finding that each issue of the student newspaper had to be reviewed by the high school principal prior to its publication); *Morse*, 551 U.S. at 398 (student's banner confiscated and student suspended pursuant to a written school board policy prohibiting advocacy of illegal drug use). Furthermore, in none of these cases did this Court express the view that declaratory or injunctive relief was appropriate. *See Tinker*, 393 U.S. at 514 (expressing no opinion as to the form of relief which should be granted); *Bethel*, 478 U.S. at 686 (finding no constitutional violation); *Kuhlmeier*, 484 U.S. at 276 (finding that no violation of First Amendment rights occurred, and reversing the Eighth Circuit's judgment calling for an injunction); *Morse*, 551 U.S. at 410 (finding no constitutional violation). Thus, the Second Circuit's decision in this case does not conflict in any way with this Court's decisions in *Tinker*, *Bethel*, *Kuhlmeier*, or *Morse*.

II. The Second Circuit Correctly Held That Petitioner Waived Any Claim for "Nominal Damages" By Not Raising It on Appeal

Petitioner presented this case to the Second Circuit as solely "a suit for Declaratory Judgment and Permanent Injunctive relief." (Initial Brief of Plaintiff-Appellant, p. viii). Accordingly, the Second Circuit ruled that Petitioner had waived any claim for damages. Indeed, Fed. R. App. P. 28(a)(10) expressly requires an appellant's brief to state "the precise relief sought."

Moreover, "[i]ssues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal." *Norton v. Wal-Mart Corp.*, 145 F.3d 114, 117 (2d Cir. 1998). *See also Adler v. Duval Co. Sch. Bd.*, 112 F.3d 1475, 1480 (11th Cir. 1997) (plaintiffs-appellants seeking redress for school officials' alleged First Amendment violations waived their claim for damages, under Fed. R. App. P. 28, where their initial brief on appeal focused on their claims for declaratory and injunctive relief).

Petitioner argues that Fed. R. Civ. P. 54(c) and *Citizen's United v. Federal Election Commission*, 130 S. Ct. 876 (2010), require a different result, but that argument has no merit. Neither Fed. R. Civ. P. 54(c) nor *Citizen's United* addresses, let alone abrogates, an appellant's responsibility under Fed. R. App. P. 28 to state "the precise relief sought."

Furthermore, Petitioner had asserted only an incidental claim for nominal damages before the district court. (*See* A[2] at 222). Even if Petitioner had not waived that claim on appeal, "[t]he Supreme Court has never held that a claim for nominal damages is sufficient to maintain the justiciability of a case that otherwise would be moot." *Utah Animal Rights v. Salt Lake City Corp.*, 371 F.3d 1248, 1266-69 (10th Cir. 2004) (McConnell, J., concurring). *Cf. Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997) ("It should have been clear to the Court of Appeals that a claim for nominal damages, extracted late in the day from [plaintiff's]

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[2] "A" refers to the Appellant's Appendix filed with the Second Circuit.

general prayer for relief and asserted solely to avoid otherwise certain mootness, bore close inspection.")

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. Therefore, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

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